In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1408

CHARLES LEE WRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his plea of guilty was involuntary because it was induced by the district court's unfulfilled promise that petitioner would be sentenced to probation and because he did not understand the nature of the charges against him.

Petitioner pleaded guilty in the United States District Court for the Northern District of Illinois to an indictment charging him and one Vera Mae Weatherspoon[1] with having distributed heroin, in violation of 21 U.S.C. 841(a)(1). Petitioner was sentenced to three years' imprisonment, to be followed by a three-year term of special parole.[2] The court of appeals affirmed (Pet. App. 1a-5a) in an opinion reported at 510 F.2d 976.

[1]Co-defendant Weatherspoon also pleaded guilty.

[2]The maximum permissible sentence under the statute is 15 years' imprisonment.

1. Eight days after sentence was imposed, petitioner's trial counsel filed a motion in the district court to reduce sentence. The motion was accompanied by an affidavit in which counsel stated that a conference between defense counsel and the court was held one month prior to entry of the guilty plea at which the court had indicated an "inclination and disposition to grant the defendant probation in the event the defendant was to plead guilty to the charge, but dependent on a presentence report" (R. 33). Trial counsel's affidavit also recited that the court had indicated that there was no "binding effect" to that inclination (*ibid.*).The district court denied petitioner's motion for a reduction of sentence. Petitioner never subsequently sought to withdraw his guilty plea pursuant to Rule 32(d), Fed. R. Crim. P., or 28 U.S.C. 2255.

On appeal, petitioner's appellate counsel[3] argued that petitioner's plea was not voluntary because it was induced by the judge's unfulfilled promise of probation.[4] Because the court of appeals found that "[petitioner] has made no factual allegations of a promise, and the allegation that any promise was made at all rests on questionable speculation indulged in by [petitioner's] appellate attorney" (Pet. App. 3a), it concluded that no evidentiary hearing was required. In view of the district judge's clear admonition that his preliminary inclination towards probation was not binding, and since there was no reason to suppose that trial counsel

[3]Petitioner was represented by new counsel on appeal.

[4]As the court of appeals noted (Pet. App. 3a), the district court had no occasion to rule on that argument since petititoner never filed a motion to withdraw his guilty plea.

misled petitioner concerning the import of the judge's remarks, that ruling was plainly correct.[5]

Petitioner further claims that the trial court erred by not asking him whether his guilty plea had been induced by promises. However, so long as the court assures itself that the plea is made voluntarily, as it did here, there is no requirement that it expressly determine that no promises have been made.[6] Even the proposed amendments to Rule 11 now before Congress (see H.R. 6799) deal with disclosure of promises by the government to defendants, not with discussions between the court and defendants as to possible sentences. Since it is a participant in the latter case, the court already will be informed of any such agreement.

Here the district judge, having expressly stated to defense counsel that his inclination towards probation was "not binding," was well aware that he had made no promises and did not need to question petitioner to establish that fact. Before accepting petitioner's guilty plea the judge stressed that he could impose a 15-year prison term, and petitioner stated that he nonetheless wished to plead guilty (Pet. App. 23a). In those circumstances, petitioner was not prejudiced by the district court's failure to inquire specifically whether the plea had been induced by promises.

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[5]As the court of appeals pointed out, *United States* v. *Mancusi*, 275 F. Supp. 508 (E.D. N.Y.), relied upon by petitioner, is distinguishable because the facts there suggested that defense cousel might have misled the defendant. There is no similar indication or allegation here. Indeed, there has been no showing that petitioner's trial counsel conveyed a "promise" from the court to petitioner and that this promise induced the plea of guilty; petitioner's argument is based only on a contention that it is "reasonable to infer" that such a "promise" was conveyed. See Pet. App. 2a-3a.

[6]As the Seventh Circuit noted in tis opinion (Pet. App. 2a-3a, n. 3), that Circuit, in anticipation of congressional approval of proposed amendments to Rule 11, Fed. R. Crim. P., which would require disclosure in open court of plea agreements reached by the parties, has instructed district judges to ask the government and defendants whether there have been plea negotiations. See *Moody* v. *United*

2. The court of appeals also properly rejected petitioner's contention that the district court did not adequately determine that he understood the nature of the charges.

Rule 11 does not require that the court follow any particular ritual in determining that the defendant comprehends the charges against him. *McCarthy* v. *United States*, 394 U.S. 459, 467, n. 20. Here, after reading the indictment to petitioner, the trial court asked him whether he did the act charged and whether he was pleading guilty. Petitioner responded affirmatively to both questions. As the court of appeals held (Pet. App. 5a), since the offense charged was not complex and in view of the presence of counsel, the court's inquiry, combined with the reading of the indictment, satisfied the requirement of Rule 11 that the court ascertain that the defendant understands the nature of the charge. See *Paradiso* v. *United States*, 482 F.2d 409, 413-414 (C.A. 3); *Sappington* v. *United States*, 468 F.2d 1378, 1379-1380 (C.A. 8), certiorari denied, 411 U.S. 970.[7]

Petitioner also points to the subsequent sentencing hearing, at which he asserted that he was innocent and that he had pleaded guilty only because his defense was weak. On appeal, he argued that these protestations demonstrated that his plea was involuntary. However, the court of appeals correctly held that "[w]here there exists a factual basis for the plea, a plea of guilty can be found to be voluntarily, knowingly, and understandingly entered even though the defendant asserts his innocence or is simply selecting his least harmful alternative under the circumstances"

States, 497 F.2d 359, 365 (C.A. 7). That requirement, imposed by the court of appeals under its supervisory authority, is not applicable, however, to petitioner's guilty plea, which was entered before the instruction was issued to the lower courts.

[7]Petitioner asserts that *Heiden* v. *United States*, 353 F.2d 53 (C.A. 9), conflicts with the decision of the court of appeals. However, in *Heiden* the district judge failed to ascertain before judgment was entered that the defendant understood the charges against him, and the Ninth Circuit simply held that a subsequent finding of knowledge at a hearing on a motion filed pursuant to 28 U.S.C. 2255 could not cure that deficiency. The situation here is entirely different.

(Pet. App. 5a). See *North Carolina* v. *Alford*, 400 U.S. 25, 38. Petitioner's presentence report (see *McCarthy* v. *United States, supra*, 394 U.S. at 463, n. 6), and his statement to the court, after hearing the indictment read, that he did the act charged, together established a factual basis for the guilty plea. The district court therefore properly accepted the plea despite petitioner's protestations of innocence at the sentencing hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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